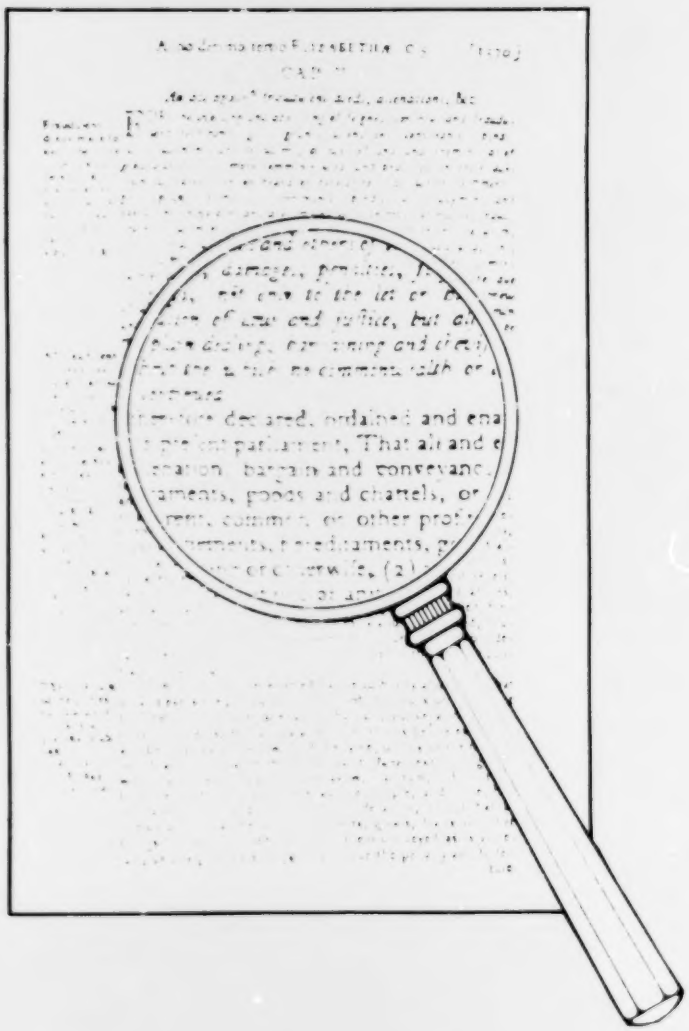
Law Reform
Commission of
Saskatchewan

Proposals for a Frustrated Contracts Act

Report to the Minister of Justice

Saskatchewan



PROPOSALS FOR A FRUSTRATED CONTRACTS ACT

Law Reform Commission of Saskatchewan
Saskatoon, Saskatchewan

Report to the Minister of Justice

November, 1988

89-04891/

The Law Reform Commission of Saskatchewan was established by An Act to Establish a Law Reform Commission, proclaimed in November, 1973, and began functioning in February of 1974.

The Commissioners are:

Mr. Dale G. Linn, B.A., LL.B., Chairman
Madam Justice Marjorie A. Gerwing
Mr. Gordon J. Kuski, Q.C.

Mr. Kenneth P.R. Hodges, B.A., LL.B. is Director of Research.

Mr. Michael J.W. Finley, B.A., LL.B., is Legal Research Officer. The Secretary is Miss Wanda Russell.

* * * * * * * * * * * * *

The Law Reform Commission Act

> 6. The commission shall take and keep under review all the law of the province, including statute law, common law and judicial decisions, with a view to its systematic development and reform, including the codification, elimination of anomalies, repeal of obsolete and unnecessary enactments, reduction in the number of separate enactments and generally the simplification and modernization of the law,...

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The Commission offices are located at the Sturdy-Stone Centre, 122 Third Avenue North, Saskatoon, Saskatchewan, S7K 2H6.

Saskatchewan

Law Reform
Commission of
Saskatchewan

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The Honourable Bob Andrew
Minister of Justice
Province of Saskatchewan
REGINA, Saskatchewan

Dear Mr. Minister:

The Commission has completed its review of the law relating to frustrated contracts.

At common law, a contract is frustrated by a variety of circumstances that make it impossible to perform the obligations it creates. Under the law as it now exists in Saskatchewan, once frustration has been found by the court, it has very limited ability to make adjustments between the parties to fairly allocate the burden of frustration. The Commission recommends legislation based on recent developments in other jurisdictions to remedy this deficiency

The Commission wishes to thank all those who have contributed to this project, Professor Louis J. Romero and Mrs. Anne Skarsgard wrote background papers on the topic. Mr. Roderick J. Wood prepared the Tentative Proposals.

Pursuant to section 9 of the Law Reform Commission Act, the Commission now submits this report recommending enactment of a Frustrated Contracts Act.

Respectfully submitted this 21st day of November, A.D. 1988.

Dale G. Linn,
Chairman.

Madam Justice Marjorie A. Gerwing,
Commissioner.

Gordon J. Kuski, Q.C.,
Commissioner.

INTRODUCTORY NOTE

This is a final report based on the Commission's "Tentative Proposals for a Frustrated Contracts Act" released in April, 1987. The recommendations herein are identical to those in the Tentative Proposals with the addition of a recommendation that the legislation should only be applicable to contracts entered into after it comes into force.

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I. INTRODUCTION

For the most part the law holds contracting parties to their bargains. But occasionally an event occurs that is so unforeseen, or so erodes the contractual substratum that the law declares the contract at an end and discharges the parties from their unperformed obligations. When this occurs the contract is said to be frustrated. Expropriation, government interference and war are typical events sufficient to frustrate a contract.

Once a court decides that a contract is indeed frustrated, it has a problem. Money may already have been paid over, work may have been commenced and expenses incurred. But the common law recognizes only a very limited power in the courts to make adjustments that would permit the recovery of benefits conferred upon each of the parties to the contract.

Legislation was adopted in England in 1943 to remedy this deficiency.[1] Subsequently, the legislation was widely copied in the Commonwealth. In 1948, the Uniform Law Conference of Canada proposed a Uniform Frustrated

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[1] 6 & 7 Geo. 6, c.40 (U.K.).

Contracts Act based on the English model.[2] All the common law provinces and territories except Saskatchewan, British Columbia and Nova Scotia have adopted similar legislation.[3]

Although the English reform reduced the inequality that often flowed from the common law, it has not proved entirely satisfactory. In 1971, the Law Reform Commission of British Columbia recommended frustrated contracts legislation for that province. Its proposals reflected criticisms of the English model that had accumulated in the twenty years since it was first enacted.[4] A new Uniform Frustrated Contracts Act based on the British Columbia proposals was adopted by the Uniform Law Conference in 1973.[5] British Columbia

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[2] 1948 Conference Proceedings, at 18.

[3] S.A. 1949, c.44, now R.S.A. 1980, c.F-20; S.M. 1949, c.21, now R.S.M. 1970, c.F-190; S.N.B. 1949, c.19, now R.S.N.B. 1973, c.F-24; S.O. 1949, c.36, now R.S.O. 1980, c.179; S.P.E.I. 1949, c.15; now R.S.P.E.I. 1974, c.F-14; S.Nfld. 1956, No.29, now R.S.Nfld. 1970, c.144; O.N.W.T. 1956 (2nd), c.1, now R.S.N.W.T. 1970, c.F-10; O.Y.T. 1956, c.1, now R.O.Y.T. 1971, c.F-10.

[4] (1971), L.R.C. 3 (hereafter the "British Columbia Report").

[5] 1973 Conference Proceedings, at 323.

enacted a Frustrated Contracts Act in 1974.[6]

The Law Reform Commission of British Columbia's approach has been endorsed by reports in other Commonwealth jurisdictions.[7] These reports have, however, indicated some respects in which the British Columbia proposals can be improved. The Commission proposes adoption of legislation based on the British Columbia model and more recent recommendations from other Commonwealth jurisdictions.

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[6] Frustrated Contracts Act, S.B.C. 1974, c.37, now R.S.B.C. 1979, c.144.

[7] Nova Scotia: Frustrated Contracts Law - A Study Paper (1976); New South Wales: (1976), L.R.C. 25 (hereafter the "New South Wales Report"); South Australia: Seventy-First Report of the Law Reform Committee of South Australia Relating to the Doctrine of Frustration of the Law of Contract (1983).

II. RECOVERY OF BENEFITS CONFERRED UNDER FRUSTRATED CONTRACTS

1. Frustration as risk-allocation

The modern doctrine of frustration was developed by the English courts in the last half of the nineteenth century. In Taylor v Caldwell, an 1863 decision, it was held that if performance of a contract depends on the continued existence of a person or thing, impossibility of performance arising from the perishing of that person or thing will excuse performance.[8]

The doctrine which was established in subsequent decisions was clearly based on the notion that the court should go beyond the limitations of the actual contract to assist the parties when the unexpected occurs. Lord Radcliffe gave expression to the modern view in a 1956 decision that has often been cited with approval:[9]

> ...frustration occurs whenever the law recognises that, without default of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically

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[8] (1863), 3 B. & S. 826, [1861-73] All E.R. Rep. 24.

[9] Davis Contractors, Ltd. v Fareham Urban District Council, [1956] 2 All E.R. 145, at 160. This view was endorsed in Peter Kiewit Sons' Company of Canada Limited v Eakins Construction Limited, [1960] S.C.R. 361, at 368.

> different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do.

The doctrine of frustration is essentially a risk-allocation procedure.[10] The court must ultimately consider whether it is reasonable to place the risk of non-performance due to supervening events upon one or the other of the parties. If the risk is placed upon a party, then he must perform or pay damages for breach of contract. If it is not reasonable to place the risk on either party, the contract is frustrated.

It is not always easy to predict when the doctrine of frustration will be applied by the courts. Some commentators have argued that the doctrine of frustration requires reform. But the most pressing problem is not with the doctrine of frustration itself, but with the law of restitution that operates after a contract is found to be frustrated. Frustration puts an end to the contract and discharges the parties from liability for future performance. But only future performance is excused. The contract remains a valid and subsisting contract up to the moment of frustration.

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[10] See P.A. Atiyah, An Introduction to the Law of Contract, (3rd ed. 1981), at 211-15.

The parties are not excused from performing obligations which have accrued prior to frustration. As a risk-allocation procedure, this aspect of the doctrine is deficient. As R.M. Goode has suggested

> [T]he doctrine is too inflexible, for it involves an all-or-nothing approach....What is needed is some legal mechanism for adjusting contract terms so as to divide between the parties on a more equitable basis the cost of serious and unforeseen intervening events....[11]

2. Recovery under the common law

The courts have grappled with the problem of restitution on more than one occasion, and not entirely consistently. Chandler v Webster,[12] is an example of an early effort to confront the problem. A renter agreed to lease a room for viewing the coronation procession in 1902. Part of the rent was due, but unpaid when the contract was frustrated by cancellation of the procession. It was held not only that the would-be renter was unable to recover monies paid, but he remained liable for the balance. Yet , it would appear that if the obligation to pay the balance had not

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11 R.M. Goode, Commercial Law, (1982), at 137.

12 [1904] 1 K.B. 493.

matured until sometime after the cancellation of the procession, the obligation to pay would have been discharged under the doctrine of frustration.[13]

Four decades later, in Fibrosa Spolka Akcyjna v Fairburn Lawson Combe Barbour[14], the House of Lords overruled the Chandler decision. An English company had agreed to manufacture and deliver machinery to a Polish company. One-third of the purchase price was payable in advance. After pre-payment, but before construction of the machinery was completed, the Germans occupied Poland. The Polish company asked for the return of its part-payment on the ground of total failure of consideration. The English company resisted, claiming that considerable work had already been done on the machinery.

The House of Lords held that the Polish company was entitled to the return of its money. But the scope of the Fibrosa decision is limited. It applies only where there has been a total failure of consideration. The receipt of some benefit, no matter how small, would have

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13 See Krell v Henry [1903] 2 K.B. 740 All E.R. Rep. 20, another "Coronation Case".

14 [1942] 2 All E.R. 122.

defeated the claim, a result that can hardly be regarded as equitable. On the other hand the rule set out in the Fibrosa decision may also work an injustice upon a person to whom the money is paid under a frustrated contract. Where there has been a total failure of consideration, he must repay the money notwithstanding that he has been put to considerable expense.

The Fibrosa decision only applied to an action to recover money. The common law constructed equally vexing hurdles where the claim was in respect of services rendered or property transferred before discharge of the contract through frustration.

Recovery of the value of part-performance was made difficult by the common law rule of entire contracts, known also as the rule in Cutter v Powell.[15] This holds that no payment for part performance can be claimed by a party to an entire contract. In Appleby v Myers,[16] a supplier of machinery contracted to install certain

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[15] (1795), 6 T.R. 320, 101 E.R. 573, [1775-1802] All E.R. Rep. 159. An entire contract is one in which consideration is a lump sum (or other "entire consideration"), and no provision is made for setting off a portion of this consideration against part performance.

[16] (1867), L.R. 2 C.P. 651, [1861-73] All E.R. Rep. 452.

machinery on the defendant's premises and to keep it in repair for two years. The price was to be paid on completion. After part of the work had been completed, a fire broke out which completely destroyed the premises. The supplier sought to recover compensation for work done and materials supplied before frustration. His claim was rejected. It was held that the contract was entire; full performance would have had to be rendered before the plaintiff could claim the price.

The common law invented yet another barrier to the recovery for part performance. Even if a claim to compensation under the contract is blocked it might be argued that restitution of the value of services rendered in an action upon a quantum merit might be available. But quantum merit was originally based upon a theory of implied contract; if there is an express contract between the parties, it is impossible to imply another contract with conflicting terms.[17]

This obstacle has almost certainly been circumvented by the decision of the Supreme Court of

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[17] Britain v Rossiter (1879), 11 Q.B.D. 123.

Canada in Deglman v Guaranty Trust Company of Canada.[18] In that case, the Supreme Court of Canada rejected the implied contract theory as the theoretical basis of restitutionary relief. While the case involved an unenforceable contract rather than one discharged through frustration, the principle is stated widely enough to apply when restitution is sought in a frustration case.

Deglman thus may open the way for a reshaping of the law of restitution in frustration cases, but to date that step has not been taken. It has been more than thirty years since Deglman was decided, yet there has been no instance where restitutionary principles were applied to grant recovery under a frustrated contract. And since every common law province except Saskatchewan and Nova Scotia now possess frustrated contracts legislation, the development of such principles by the courts can be expected to be sporadic at best. A legislated solution to provide a fair system of apportionment when frustration occurs is required.

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18 [1954] S.C.R. 725.

III. APPROACHES TO REFORM

1. Older statutory solutions

The English Law Reform (Frustrated Contracts Act), 1943 and the Canadian legislation based on it rests on two basic propositions:

1) money paid or payable prior to frustration is recoverable, but the court has a discretion to permit offset for incurred expenses "if it considers it just to do so having regard to all the circumstances".

2) if a valuable benefit (other than money) is obtained by a party by reason of anything done by the other party in connection with the performance of the contract, the court may order that all or part of it be recovered if it considers it just to do so.

Certain classes of contracts are excluded from operation of the statute.[19]

The offset provision is one of the most controversial aspects of the Act. Where there is a prepayment, the party to whom the money is paid can not recover any expenses in excess of the prepayment. This rule was apparently based on the assumption that prepayment is intended to protect the party to whom the

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[19] Excluded are charter parties and contracts for the carriage of goods by sea, contracts of insurance, and contracts for the sale of goods which perish at the time the contract is made or before the risk passes to the buyer.

money was paid from loss under the contract. Goff and Jones question this assumption:

> It by no means follows that, where a prepayment is stipulated for, the parties intend that the payer shall stand the risk of expenditure lost by the payee because of frustration of the contract. The object of the advance may be to put the payee in funds to continue the contract, or to protect him from loss following from the payer's breach or insolvency.[20]

The right to recover the value of a benefit (other than money) obtained by the other party is also limited under the Act. The "benefit" is measured by the actual advantage received by the party after the frustrating event. If a party receives no real benefit from the partial performance, he does not have to pay for it. Thus the Act does not relieve the hardship in such cases as Appleby v Myers.[21]

The Act has also been criticized because it relies heavily on discretion. It is said that in commercial contracts it is undesirable that these questions should depend on the uncertain exercise of judicial discretion.

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20 The Law of Restitution (2nd ed. 1978), at 567.

21 See above, footnote 16.

2. Alternative approaches to reform

Two general solutions to the inadequacies of the English Act have been proposed. The first is essentially a pure restitutionary approach, the second would rely upon apportionment of loss between the parties. Goff and Jones, criticizing the English Act, summarize both approaches as follows:

> There are two other solutions which might have been adopted. One is that, where benefits received by either party in pursuance of the contract should be restored or paid for, the loss of expenditure otherwise incurred under the contract should lie where it falls. This is the solution generally adopted in the United States. The other solution is that, in addition to restitution to benefits received, the two parties should bear equally the expenditure otherwise incurred by both under the contract. This solution regards the contract as a joint venture which has failed without fault.[22]

The restitutionary approach is primarily concerned with prevention of unjust enrichment. A party would recover any benefit conferred upon the other, benefits being defined in this context to encompass part performance, even if that performance does not increase the recipient's wealth. Reliance expenses, however, would not be recoverable, on the assumption that it

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[22] The Law of Restitution (1st ed. 1966), at 333.

would be fairer to let that loss lie where it falls.

Advocates of some form of apportionment of loss argue that the law of frustration is fundamentally concerned with spreading loss that results from an event unforeseen by the parties to the contract. Glanville Williams has suggested that:

> The situation with which the [English] Act is concerned is the familiar one in which one of two parties has to suffer loss for which neither is responsible. In my submission, natural justice does not indicate either of such parties as the one to bear the whole of the loss. Natural justice neither says the loss shall lie where it falls, nor yet says that the loss shall be picked up from where it happens to fall and transferred to the shoulders of the other party who would otherwise would not have borne it. Either natural justice, on my understanding of it, is altogether silent in a case of this sort, or it decrees that the distribution of loss shall be equal. Equal division of loss is also economically sounder than the placing of loss on one party only, for each of the two parties may be able to bear half the loss without serious consequences when the whole loss might come close to ruining him.[23]

Under the apportionment approach, restitution of benefits received as a result of part performance would be appropriate, but reliance expenses would be subject to apportionment.

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[23] A Note on the Law Reform (Frustrated Contracts) Act, 1943 (1944), 7 M.L.R. 66.

The British Columbia Frustrated Contracts Act adopted a combination of restitution and apportionment. It provides that:

> 5 (1) Subject to section 6, every party to a contract which this Act applies is entitled to restitution from the other party or parties to the contract for benefits created by his performance or part performance of the contract.
>
> (2) Every party to a contract to which this Act applies is relieved from fulfilling obligations under the contract that were required to be performed prior to the frustration or avoidance but were not performed, except insofar as some other party to the contract has become entitled to damages for consequential loss as a result of the failure to fulfil those obligations.
>
> (3) Where the circumstances giving rise to the frustration or avoidance cause a total or partial loss in value of a benefit to a party required to make restitution under subsection (1), that loss shall be apportioned equally between the parties required to make restitution from the party to whom the restitution is required to be made.
>
> (4) In this section a "benefit" means something done in the fulfilment of contractual obligations whether or not the person for whose benefit it was done received the benefit.

IV. THE PROPOSED SCHEME

1. The basic approach

The British Columbia Frustrated Contracts Act introduced an important innovation by legislating the equal apportionment of the reliance expenses. This Commission agrees with the British Columbia Commission that a purely restitutionary approach is too inflexible a response. The underlying assumption of the restitutionary approach is that he who requests performance must take the risk of loss owing to a frustrating event. This is too great a generalization. Restitution for actual benefits conferred by the contract is appropriate, but other losses should be apportioned.

But while the British Columbia Act is a welcome improvement to the remedial law, it is the view of the Saskatchewan Law Reform Commission that the notion of apportioning expenses should be developed more fully. In particular, this Commission does not believe that it is always appropriate to apportion reliance losses equally. A rule of equal apportionment of the reliance losses should operate as a residual rule. The court should have the option of placing the reliance cost on

one party or the other, or apportioning it between the parties. If parties have incurred expenses, the court may, in appropriate cases, hold that each is to bear responsibility for his own lost expenses.

Take as an example the following the scenario. A manufacturer contracts to build machinery according to the buyer's specifications. These specifications call for a certain component available from a single source. The machinery is half completed when it becomes impossible to obtain the component from the source. A court may well conclude that neither the manufacturer nor the buyer undertook the risk of that event. Nevertheless, it may conclude that the buyer should fully bear the expenses incurred by the manufacturer, since it was the buyer who called for that particular design. If, however, the engineers of the buyer and the manufacturer jointly designated the machinery, an apportionment of the losses may well be the most appropriate remedy.

The implications of the approach favoured by the Commission will now be explained more closely.

1. Discharge of obligations

Frustrated contracts legislation generally provides for the discharge of all unfulfilled obligations prior to the frustrating event, and then proceeds to apply its rules to benefits conferred and expenses incurred by the parties to the contract. The British Columbia Report recommended an exception to this rule of discharge of prior unfulfilled obligations:[24]

> A party should remain liable for damages for consequential loss. For example, if a party failed to pay a sum as required by the contract, before frustration occurred, he should be relieved from paying that sum but should remain responsible for the loss his breach may have caused, i.e., the party to whom the sum was payable may have had to borrow funds as a result and have thus incurred interest charges.

This recommendation was implemented by section 5(2) of the British Columbia Act. The Commission proposes that a similar provision be adopted.

However, the Commission is also of the opinion that in some cases the remedial scheme should apply to performance rendered and expenses incurred after the frustrating events on the mistaken, but reasonable, assumption that frustration has not occurred. A party to

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[24] British Columbia Report, at 33.

a contract may be unaware of the occurrence of the frustrating event and continue rendering performance under it. Neither the common law nor the British Columbia Act apply to any performance rendered after the contract has been discharged. Recovery in such a case will depend upon the doctrine of mistake.

The Commission thinks that this bifurcation is undesirable. It should be noted that the New South Wales Frustrated Contracts Act extends its scope to encompass things done after the frustrating event.[25]

2. Measuring the benefit

The next step after discharging the parties from their contractual obligations is to measure the value of the benefits that have been conferred under the contract prior to frustration. Where the only performance rendered is the payment of money, the solution is simply to order the return of that money. Where property is transferred, restitution is possible by returning the property in specie.[26] Where the performance takes some

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[25] Section 5(4).

[26] Section 7(b) of the British Columbia Act provides for such a return in specie of the benefit.

other form, a method must be devised for measuring the value in money terms of the benefit conferred.

Ordinarily, the law of restitution would assess a benefit on its fair market value. However, where restitution is for benefits conferred under a frustrated contract, the stipulated contract price should not be ignored. The parties themselves have set a value and this is relevant even though the contract may be at an end. Palmer argues that this is entirely consistent with restitutionary principles.[27]

The British Columbia Act addresses this issue by utilizing the notion of severability. Under section 4, if part of the contract has been wholly performed except for payment of an ascertainable sum, that part can be severed and treated as a separate contract. Posner and Rosenfield comment upon a similar American divisibility rule:[28]

> The basic rationale in such cases seems restitutionary, and appears to make good sense. But it would be cleaner to drop the fiction of divisibility and simply to view the contract as discharged, and then decide what compensation is due the performing party for having conferred benefits on the other party

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[27] Supra, footnote 25, at 126.

[28] Supra, footnote 22, at 117.

> to the contract before the event giving rise to the discharge occurred.

The Commission shares this view. Reform legislation should permit the court to pro-rate the contract price in appropriate cases without having to invoke an often fictional notion of severability.

In many cases, however, a simple pro-rating of the contract price will not be appropriate. In such cases the court must seek another standard such as the fair market value, the cost of the performance to the party rendering it, or the cost of completion. In no case, however, should the compensation to the part-performing party exceed the contract price.

3. Measuring and apportioning the lost expenses

The British Columbia Act calls for the automatic equal apportionment of reliance losses. This Commission proposes that a court should be empowered to order that the reliance loss be borne by one or the other party to the contract, or that it be apportioned between the parties.

It is first necessary to define what expenses are subject to such apportionment. In a celebrated article,

Fuller and Perdue[29] distinguish between two types of reliance expenses. "Essential reliance expenses" are those actually incurred in performance of the contract or in necessary preparation for performance of the contract. These expenses are "essential" because without them the contract cannot be performed.

The parties to the contract also may have incurred "incidental reliance expenses". For example, a tradesman may have turned down other contracts on the assumption that he will be occupied in the performance of the first one. But these costs are not essential because they are not necessary for the performance of the contract.

The Commission is of the view that only essential expenses should be subject to apportionment. The inclusion of incidental reliance expenses would cast the net too wide. Recovery in respect of lost opportunities would in some cases amount to apportionment of the future unperformed portion of the contract. Furthermore, incidental reliance expenses are too far removed from the contract. They are incurred because of

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29 "The Reliance Interest in Contract Damages" (1936), 46 Yale L.J. 52, at 78 and 90-92.

one party's independent decision about his own affairs and it would be going too far to make the other party share in these losses.

It may be possible for the party who has incurred expenses to apply them against some other contract. For example, if the machines partly built in the Fibrosa case could have been resold for their full cost, the sellers should not be entitled to claim them under the legislation. If they sold them at a loss, they should be entitled to claim only their net loss. This principle of mitigation of loss has been incorporated in the New South Wales Act.[30] The Commission proposes that only wasted reliance expenses be subject to apportionment.

It then becomes necessary to measure the value of the lost expenses. The Law Reform Commission of New South Wales made the following comment on this issue:[31]

> The cost incurred by a party to perform a contract may have many elements. A precise calculation of the cost of each of them may be difficult or impossible. We consider that that cost should be defined so that a fair sum for it can be ascertained without excessive

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[30] Sections 13(2)(b) and 14(2)(b). See also the New South Wales Report, at 35, para. 7.23.

[31] New South Wales Report, at 34-35, para 7.19.

> investigation of each item of cost. We recommend that that cost be taken to be such amount as is fair compensation to the performing party for the burden he has incurred, acting reasonably, by paying money, doing work or doing or suffering any other thing, for the purpose of giving the performance. Precise identification, analysis and apportionment of each item of cost should not be necessary.

This Commission agrees. Furthermore, the party should be restricted to the recovery of "reasonable expenditures", a term originally adopted in the British Columbia Act.[32]

In assessing the value of lost expenses, the court should consider whether a party had entered into an unprofitable contract. The legislative scheme should not put a party to a frustrated contract in a better position than if the contract had been performed.

Next is the matter of allocating reliance expenses. The court may place the loss on one or the other of the parties, or apportion it between them. The Commission is of the view that the statute should give some guidance to the courts in this respect. It should outline some of the factors that should be considered, but it should not purport to be an exhaustive statement.

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[32] Section 7(a).

The court must in the first instance examine the contract and the contractual background in order to see what inferences concerning the allocation of risk can be drawn from it. The court should have regard to any course of dealing between the parties to the contract, and any custom in the trade, including any general trade practice relating to insurance against the kind of event that caused the loss.[33]

Admittedly, in many cases it will not be easy to allocate the reliance expenses. In the words of Corbin: "Where neither custom nor agreement determines the allocation of a risk, the court must exercise its equity powers and pray for the wisdom of Solomon".[34] In doubtful cases the court should simply treat the contract as a joint enterprise and apportion the expenses equally.

4. Miscellaneous provisions

(a) Scope of the Act

The English and old Uniform Act did not apply to three types of contracts: charter parties and the

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[33] See the British Columbia Act, s.6.

[34] Corbin on Contracts (1962), vol. 6, at 371-2.

carriage of goods by sea, contracts of insurance, and certain contracts for the sale of specific goods. An absolutely convincing case has been made out against the sale of goods exception.[35] The British Columbia Act has deleted it, and this Commission does not wish to see the provision perpetuated.

It should also be noted that under the Saskatchewan Insurance Act[36] when a fire, hail, automobile, or sickness and accident insurance policy is voluntarily surrendered, the insurer must refund the excess of premium. This will take care of the most common types of insurance contracts. As for the rest, this Commission is, on balance, persuaded by the British Columbia Commission and proposes that the insurance exception be retained.

Finally there is the matter of charter parties and carriage of goods by sea. It is unlikely that such contracts will ever be governed by the law of Saskatchewan. Since the exception of such contracts reflects long established commercial practice, it is

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[35] See British Columbia Report, at 35-37 for a summary of the criticisms of this exception.

[36] R.S.S. 1978, c. S-26.

proposed that the exception be retained.

(b) Arbitration clauses

The courts have not yet resolved the question whether an arbitration clause survives the discharge of the contract, although the better view appears to be that it does.[37] In a study paper Professor David Mullan recommended the inclusion of an express provision to the effect that the arbitration clause survives so that it is the consensual arbitrators who will deal with disputes over the consequences of frustration.[38] The Commission agrees.

(c) Application of legislation

The Commission agrees with the Law Reform Commission of British Columbia that the legislation should not be retroactive[39]. If the legislation were retroactive, it would have the effect of altering the rights of the parties under a contract

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37 Payne, "Reform of the Law of Frustrated Contracts in Saskatchewan" (1960), 25 Sask. Bar Rev. 94, at 94-95.

38 Frustrated Contracts Law - A Study Paper (1976), at 24-25.

39 British Columbia Report, at 45.

which they freely negotiated. The Commission recommends that the legislation should only be applicable to contracts entered into after it comes into force.

VII. THE PROPOSED ACT *

Short Title

1. This Act may be cited as The Frustrated Contracts Act.

Application

2.-(1) Subject to subsection (2), this Act applies to every contract:

(a) from which the parties to it are discharged by reason of the application of the doctrine of frustration; or

(b) that is avoided under section 9 of The Sale of Goods Act;

to the extent that, upon a true construction of the contract, it contains no provision for the consequences of frustration or avoidance.

(2) This Act does not apply to:

(a) a charter party or contract for the carriage of goods by sea, except a time charter party or a charter party by demise;

(b) a contract of insurance;

(c) to contracts entered into before the date of coming into force of this Act.

(3) This Act applies to benefits conferred and expenses incurred by a party after the frustrating event on the mistaken belief that the contract was not frustrated.

Parties relieved from accrued obligations

3. Each party to a contract to which this Act applies is relieved from fulfilling obligations under the contract that were required to be performed prior to the frustation or avoidance but were not performed, except insofar as a party to the contract has become entitled to damages for consequential loss as a result of the failure to fulfil those obligations.

Restitution benefits

4.-(1) Each party to a contract to of which this Act applies is entitled to restitution of benefits remaining after the frustrating event which are conferred by virtue of that party's performance or part performance of his contractual obligations.

(2) In measuring the value of the benefit conferred, the court shall bave regard to the contract price as well as any diminished value of performance caused by the failure to complete.

(3) Where performance consists of delivery of property, the amount of the claim shall be reduced by the value of any property returned to the performer within a reasonable time.

Apportionment of lost expenses

5.-(1) in this section, "expenses" means reasonable expenses incurred in performance of the contract or in necessary preparation for performance to

the extent that such expenses cannot be applied against some other contract.

(2) The court may apportion the value of lost expenses equally between the parties or in such other proportion as it thinks appropriate.

(3) In assessing the value of lost expenses, the court may have regard to the contract price.

(4) In making the apportionment, the court shall have regard to a course of dealing between the parties, a custom or common understanding in the trade including a trade practice relating to insurance, and any other relevant circumstance that indicates that one or the other of the parties should bear the risk of lost expenses, or that each party should bear his own lost expenses.

Arbitration clause survives frustration

6. A provision in a contract providing for the arbitration of disputes applies notwithstanding a frustration of the contract.

Act binds Crown

7. The Crown is bound by the Act.

* Should there be any variation between the text and the Proposed Act, the text governs.